No. 14-10154

IN THE
Supreme Court of the United States

STEPHEN VOISINE and WILLIAM ARMSTRONG III,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE BRADY CENTER TO PREVENT GUN VIOLENCE, THE LAW CENTER TO PREVENT GUN VIOLENCE, THE VIOLENCE POLICY CENTER, AND THE EDUCATIONAL FUND TO STOP GUN VIOLENCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The **Brady Center to Prevent Gun Violence** is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that firearms are kept out of the hands of dangerous people who pose a significant risk of committing crimes, including an interest in ensuring that 18 U.S.C. § 922(g)(9) and other federal gun laws are properly applied to allow strong government action to prevent gun violence. This Court cited an *amicus* brief filed by the Brady Center in construing Section 922(g)(9) in *United States v. Hayes*, 555 U.S. 415, 427 (2009). The Brady Center also filed an *amicus* brief construing Section 922(g)(9) in *United States v. Castleman*, 134 S. Ct. 1405 (2014). Through its Legal Action Project, the Brady Center has filed *amicus* briefs in numerous other cases involving the constitutionality and interpretation of firearms laws, including *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

The **Educational Fund to Stop Gun Violence** is a non-profit organization that seeks to secure freedom from gun violence through research, strategic engagement, and policy advocacy. The

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[1] The parties have consented to the filing of this brief, and letters confirming such consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief.

Educational Fund has filed *amicus* briefs in numerous cases involving gun laws. Its affiliated organization, the Coalition to Stop Gun Violence, joined the Brady Center in filing an *amicus* brief in *United States v. Castleman*, 134 S. Ct. 1405 (2014) and also filed an *amicus* brief in *Printz v. United States*, 521 U.S. 898 (1997).

The **Law Center to Prevent Gun Violence** is a non-profit, national law center dedicated to reducing gun violence and the destructive impact it has on communities. Founded by lawyers after an assault weapon massacre at a San Francisco law firm in 1993, the Law Center focuses on providing comprehensive legal expertise to promote smart, effective gun laws. The Law Center has filed *amicus* briefs in many Second Amendment cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and has joined the Brady Center in filing *amicus* briefs in firearm-related cases including *United States v. Castleman*, 134 S. Ct. 1405 (2014) and *United States v. Hayes*, 555 U.S. 415 (2009).

The **Violence Policy Center** is a non-profit organization that works to stop the broad-based public health crisis that is gun violence through research, advocacy, education, and collaboration. The Center joined the Brady Center in filing an *amicus* brief in *United States v. Castleman*, 134 S. Ct. 1405 (2014), and regularly submits and joins *amicus* briefs in cases that involve gun laws.

SUMMARY OF ARGUMENT

Congress enacted the Lautenberg Amendment, codified as 18 U.S.C. § 922(g)(9), to keep guns away from individuals with a domestic violence record because of the threat they present to others, especially their own families. Section 922(g)(9) reaches broadly to prohibit "any person" who has been convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. 18 U.S.C. § 922(g)(9). "Misdemeanor crime of domestic violence" is defined to encompass any "misdemeanor" that has as an element "the use or attempted use of physical force, or the threatened use of a deadly weapon," in a domestic setting. 18 U.S.C. § 921(a)(33)(A). The court of appeals correctly held that petitioners' convictions for misdemeanor domestic assault under Maine law for intentionally, knowingly, or recklessly causing bodily injury or offensive physical contact constituted a "misdemeanor crime of domestic violence" under this statute.

Nothing in the text or the legislative history of Section 922(g)(9) supports petitioners' proposed exclusion of all misdemeanor domestic violence convictions that include a *mens rea* of recklessness. The statute was written with broad language in order to capture all those convicted of domestic abuse, including convictions for reckless domestic violence. There is nothing inconsistent with interpreting "use of . . . physical force" to include reckless infliction of harm, especially in the context of domestic violence.

Domestic abuse will often involve reckless conduct, whether because the abuser is intoxicated, acting in the heat of an argument, or emotionally unstable. Reckless assaults in the domestic violence context are not isolated incidents between strangers, but—as with domestic violence generally—are likely to repeat and escalate over time. Granting access to guns to domestic abusers who have recklessly assaulted their intimate partners or family members creates the same risk that future domestic disputes will turn fatal as granting that access to abusers who have acted intentionally. Construing Section 922(g)(9) to encompass reckless domestic abuse is therefore consistent with Congress' intent to mitigate that risk.

The special attention Congress paid with the Lautenberg Amendment to domestic abusers and their propensity for future harms is also well supported by social science. Social science research confirms the dangerous correlation between domestic abusers—including those who act recklessly—and access to firearms in light of the tendency for domestic violence to repeat and escalate.

Adopting petitioners' interpretation of Section 922(g)(9) risks exempting domestic abusers who act recklessly under the influence of drugs or alcohol. In Maine, as in many states, self-induced intoxication is not a defense for crimes with a *mens rea* of recklessness, although it may be used in defense for specific intent crimes. In light of the dangerous combination of substance abuse, domestic violence, and firearms, it is implausible that Congress would

have intended to exempt such conduct from Section 922(g)(9).

Furthermore, petitioners' interpretation would have the perverse effect of rendering Section 922(g)(9) inapplicable to a substantial majority of state misdemeanor assault and battery laws that include recklessness as an element. Such a result would frustrate Congress' clear intent to broaden the reach of the Gun Control Act to domestic abusers prosecuted under generally applicable state misdemeanors. Even domestic abusers who act intentionally would be exempt as a categorical matter from Section 922(g)(9) if they, as many do, plead to the generic offense.

Congress intended the Lautenberg Amendment to effectuate a "zero tolerance" policy against domestic abusers possessing firearms. Carving out a substantial number of domestic abusers who pose a danger to their partners and families from the reach of Section 922(g)(9) conflicts with Congress' clear intent and frustrates the manifest purpose for which the statute was enacted.

ARGUMENT

I. The Text and Legislative History of Section 922(g)(9) Demonstrate That Congress Intended to Prevent Convicted Reckless Domestic Abuse Misdemeanants From Possessing Firearms.

A. The Statutory Text Does Not Support Excluding Reckless Domestic Abuse.

The Lautenberg Amendment does not specify a required, or minimum, *mens rea* for a "misdemeanor crime of domestic violence." The only language petitioners point to in support of a heightened *mens rea* requirement is the "use of . . . physical force" language in Section 921(a)(33)(A). But this phrase, which was added to the bill as an "apparently last-minute insertion," *United States v. Hayes*, 555 U.S. 415, 428 (2009), does not by its terms require a particular *mens rea*.

This language was added to exclude property crimes from the definition of "misdemeanor crime of domestic violence," not to impose a heightened *mens rea* requirement. *See* 142 Cong. Rec. 26,675 (1996) (statement of Sen. Lautenberg) (explaining that this language prevents Section 922(g)(9) from applying to someone convicted of "cutting up a credit card with a pair of scissors"); *cf.* 18 U.S.C. § 16(a) (defining "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another" (emphasis added)).

This Court held in *Castleman* that the "use . . . of physical force" in Section 921(a)(33)(A) incorporates the "common-law meaning of 'force'." *United States v. Castleman*, 134 S. Ct. 1405, 1410 (2014). Because domestic abusers are "routinely prosecuted under generally applicable assault or battery laws," the Court explained that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction." *Id.* at 1411. Because common law battery proscribes reckless conduct, petitioners' interpretation is inconsistent with *Castleman*. *See* Resp. Br. 16–23; 2 Wayne R. LaFave, *Substantive Criminal Law*, § 16.2(c)(2), at 557 (2d ed. 2003) (LaFave); Model Penal Code § 211.1 comment (n.62) (1980) (While "[t]here was some difference of opinion in prior law as to whether reckless injuring could be prosecuted under then-prevailing battery statutes," "[m]ost courts held that it could").

An ordinary meaning analysis also confirms that a "use of physical force" can be reckless or intentional. The fact that a domestic abuser acts recklessly rather than with a pre-meditated, specific intent to cause bodily injury does not make the conduct any less of a use of force. For example, a domestic abuser who throws a lamp across the room that grazes or hits his spouse can be said to have acted recklessly. Even if he did not intend to injure or even touch his partner, the physical act of throwing the lamp was intentional. Similarly, an abuser who shakes his partner in the heat of an argument to emphasize a point might be deemed to have acted recklessly if he did not purposefully

intend his touching to be offensive. But his conduct clearly involves a use of force within the meaning of the statute.

Such an interpretation is also consistent with *Castleman*'s description of typical acts of misdemeanor domestic violence as including "pushing, grabbing, shoving, slapping, and hitting," or a "squeeze of the arm [that] causes a bruise." 134 S. Ct. at 1412 (citation and internal quotation marks omitted). An abuser could commit these acts recklessly as to the infliction of bodily injury or offense, especially if intoxicated or acting in the heat of an argument. It is highly unlikely that Congress would have intended to exclude these familiar forms of domestic abuse from Section 922(g)(9).

Even if some level of volitional conduct were required, it would be satisfied in light of the definition of "reckless" under the Maine statute. Maine law explains that "[a] person acts recklessly with respect to a result of the person's conduct when the person *consciously* disregards a risk that the person's conduct will cause such a result." Me. Rev. Stat. Ann. tit. 17-A, § 35(3)(A) (emphasis added). The statute refers to a "disregard of a risk, when viewed in light of the nature and *purpose* of the person's conduct and the circumstances known to the person," that "involve[s] a *gross deviation* from the standard of conduct that a reasonable and prudent person would observe in the same situation." *Id.* § 35(3)(C) (emphases added).

Contrary to petitioners' suggestion, merely accidental or negligent conduct will not be captured

under the Maine statute or under similar state assault and battery statutes.

In fact, it is hard to think of a reckless misdemeanor domestic violence conviction meeting that statutory definition which is so minor and unthreatening that Congress would not have intended to include it within the broad reach of Section 922(g)(9). Petitioners fail to offer any such examples, nor do they contend that the facts underlying their own convictions did not involve the "use of physical force." Because misdemeanors by their nature are "minor" offenses, allowing convictions based on recklessness to qualify as predicate offenses under Section 922(g)(9) is entirely consistent with the purpose of the statute.

Moreover, to exempt reckless conduct from "crimes of domestic violence" would ignore the unique context of domestic violence in which seemingly minor offenses repeat and escalate over time. Even where a domestic abuser may lack the specific intent to inflict immediate physical harm, reckless behavior is often part of a larger cycle of intentional intimidation, coercion, and abuse. Recognizing the unique context of domestic violence, this Court declined to extend the same interpretation of "use . . . of physical force" in 18 U.S.C. § 16(a) to Section 922(g)(9). *See Castleman*, 134 S. Ct. at 1410–11. The Court noted that Congress adopted a definition of "misdemeanor crime of violence" that was, according to the sponsor of the Lautenberg Amendment, "probably broader" than the definition of "crime of violence" in Section 16. *Id.* at 1416; 142 Cong. Rec. 26,675.

B. Congress Intended to Prohibit All Persons Convicted of Domestic Violence Misdemeanors—Including For Reckless Domestic Abuse—From Possessing Firearms.

The lack of any textual support for a heightened *mens rea* requirement is further supported by the legislative history confirming that Congress intended Section 922(g)(9) to reach broadly to *all* misdemeanor domestic violence offenses, including convictions that encompass reckless conduct. Congress enacted the Lautenberg Amendment to *close* a "dangerous loophole," that allowed domestic abusers convicted of misdemeanors to possess firearms. 142 Cong. Rec. at 22,986 (statement of Sen. Lautenberg). To exempt a substantial segment of misdemeanor domestic violence convictions would contravene clear legislative intent and frustrate the manifest purpose of the statute.

Until the mid-1990s, the Gun Control Act of 1968 prohibited convicted felons but not misdemeanants from possessing firearms. *See Hayes*, 555 U.S. at 418. However, Congress subsequently became concerned that the felon-in-possession laws were inadequate to protect victims of domestic violence from the risk posed by armed domestic abusers.

In 1994, Congress extended the firearm prohibition to any person "who is subject to a court order that . . . restrains such person from harassing, stalking, or threatening an intimate partner . . . or

child." 18 U.S.C. § 922(g)(8). This addition was the result of three competing bills offered in 1993 as amendments to an Omnibus Crime Bill. *See* S. 1570, 103d Cong. (1993) (proposed by Senator Paul Wellstone); H.R. 3301, 103d Cong. (1993) (proposed by Representative Robert Torricelli); 139 Cong. Rec. 28,509 (1993) (Senator John Chaffee's proposed language of amendment 1169 to S. 1607, the crime bill). The sponsors of these bills emphasized the need to expand the law because of the dangers inherent in the possession of firearms by domestic abusers. *See, e.g.*, 139 Cong. Rec. at 30,578–79 (statement of Sen. Chafee) ("There have been far, far too many dreadful cases in which innocent people . . have been wounded or killed by a former boyfriend or girlfriend, partner, or other intimate using a gun—despite the fact that the attacker was subject to a restraining order.").

In 1996, Congress further extended the existing firearm prohibition to those with a conviction of a "misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9). Senator Frank Lautenberg of New Jersey proposed the ban on the possession of firearms by domestic violence misdemeanants. Senator Lautenberg and others in Congress recognized that because domestic violence repeats and escalates over time, domestic abuse is especially likely to culminate in homicide or serious bodily injury if the abuser has access to firearms. However, domestic abusers were often convicted under state misdemeanor statutes, not felonies, and therefore "[e]xisting felon-in-possession laws . . . were not keeping firearms out of the hands of domestic abusers." *Hayes*, 555 U.S. at 426.

Senator Frank Lautenberg's bill proposing a misdemeanant possession ban was introduced to "close this dangerous loophole." 142 Cong. Rec. at 22,986 (statement of Sen. Lautenberg).

Congress' intent to extend the firearm prohibition beyond felonies to misdemeanors involving domestic violence recognized the unique context of domestic violence. Unlike other crimes, domestic violence by definition involves parties who have an established and ongoing close relationship. Domestic violence is not based on violent acts imposed by a stranger, but commonly arises in the context of reckless behavior by a partner. In a domestic violence setting, reckless conduct is also more likely to recur over time and to escalate into situations that could turn fatal with the presence of guns.

Senator Lautenberg explained the ongoing nature of most relationships involving domestic violence that made it likely that abuse would continue to occur again and again:

> These crimes involve people who have a history together and perhaps share a home or a child. These are not violent acts between strangers, and they don't arise from a chance meeting. Even after a separation, the individuals involved, often by necessity, have a continuing relationship of some sort, either custody of children or common property ownership.

142 Cong. Rec. at 19,415 (statement of Sen. Lautenberg).

The tendency for domestic violence to escalate poses a unique risk unlike other types of violence even at the level of recklessness. As this Court recognized, "[d]omestic violence often escalates in severity over time . . . and the presence of a firearm increases the likelihood that it will escalate to homicide." *Castleman*, 134 S. Ct. at 1408. The new law, in Senator Lautenberg's view, would "save the life" of the "ordinary American woman" caught in this escalating cycle of domestic abuse. 142 Cong. Rec. at 26,674 (statement of Sen. Lautenberg).

Nothing in the legislative history of the Lautenberg Amendment discusses a heightened *mens rea* requirement or a desire to exempt reckless misdemeanor crimes of domestic violence. To the contrary, Congress contemplated that domestic violence often occurs when abusers act recklessly, in the heat of the argument, almost without realizing what they are doing.

Senator Lautenberg explained that in many domestic violence situations, the woman's "generally . . . decent, law-abiding" husband occasionally "*loses his temper*" when "the stresses of life build," sometimes even "*los[ing] control*" and lashing out at his family. 142 Cong. Rec. at 26,674 (statement of Sen. Lautenberg) (emphases added). In the future, Senator Lautenberg foresaw, this husband would "*lose his cool* at work, or with the boys," "get into another argument with his wife." *Id.* Next, things will "escalate" and "*get out of control*," and "*almost without knowing what he is doing*, with one hand he will strike his wife and with the other hand he will reach for the gun he keeps in his drawer." *Id.*

(emphases added). This impulsive and careless behavior will change their world "in an instant" and "this woman, this loving mother, this ordinary American, will die or be severely wounded." *Id.*

Aware of the reality that escalation makes *any* level of domestic violence misdemeanant especially dangerous, Congress did not limit its firearms ban only to those offenders that demonstrated a heightened *mens rea*. Rather, Section 922(g)(9) is meant to embrace "seemingly minor predicate acts, occurring sometimes in moments of passion, where the perpetrator consciously disregarded a risk in light of known circumstances." *United States v. Voisine*, 778 F.3d 176, 184 (1st Cir. 2015). As Senator Wellstone explained, "[i]f you are not responsible enough to keep from doing harm to your spouse or your children, then society does not deem you responsible enough to have a gun." 139 Cong. Rec. at 28,360 (statement of Sen. Wellstone). A domestic abuser who acts recklessly in harming his family or partner is as irresponsible with a firearm as one who acts knowingly.

Although it "may sound like a tough policy," Senator Lautenberg explained that "when it comes to domestic violence it is time to get tough." 142 Cong. Rec. at 22,986. "There is no margin of error when it comes to domestic abuse and guns," because "[a] firearm in the hands of an abuser all too often means death." *Id.*

II. Social Science Studies Confirm That the Risk of Serious Injury and Fatality Increases Substantially When Domestic Abusers Have Access to Firearms.

Social science research confirms Congress' conclusion that *all* individuals convicted of domestic assault misdemeanors should be prohibited from owning firearms. Convictions for misdemeanor domestic violence, including under assault statutes that encompass recklessness conduct, are highly correlated with future violence against intimate partners and family members.

Each year, "[t]his country witnesses more than a million acts of domestic violence, and hundreds of deaths of domestic violence." *Castleman*, 134 S. Ct. at 1408; Jennifer L. Truman & Lynn Langton, BUREAU OF JUSTICE STATISTICS, *Criminal Victimization*, 2014. More than one in three women in the United States have experienced rape, physical violence, or stalking by an intimate partner in their lifetime. *See* National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*, Center for Disease Control and Prevention (November 2011). *See also* Patricia Tjaden & Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women*, U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS (2000).

When domestic abusers have access to firearms, the effects of domestic violence are intensified, often fatally. In households with a history of domestic violence, the presence of a gun

makes a homicide 5-fold more likely than where there is no gun. *See* Johns Hopkins Center for Gun Policy and Research, *Intimate Partner Violence and Firearms* (July 2015). In Maine, Petitioners' home state, nearly half of all homicides in 2012 and 2013 resulted from domestic violence, and more than half of these were committed with firearms. *See* MAINE DOMESTIC ABUSE HOMICIDE REVIEW PANEL, *Building Bridges Towards Safety and Accountability to End Domestic Violence Homicide* (April 2014). Nationally, two-thirds of women killed in domestic violence homicides are murdered with guns. *See* F. Stephen Bridges et al., *Domestic Violence Statutes and Rates of Intimate Partner and Family Homicide*, 19 CRIMINAL JUSTICE POLICY REVIEW 1 (2008). Of the 1,530 homicides of women in the United States in 2013 in which the relationship between the killer and the victim could be identified, 1,438 (94%) of the victims were murdered by a male they knew. *See* Violence Policy Center, *When Men Murder Women: An Analysis of 2013 Homicide Data* (September 2015).

The dangerous correlation between domestic violence and access to firearms is equally present for reckless domestic violence as it is for knowing and intentional behavior. Reckless abuse can escalate to more serious, including deadly, violence in the same or future incidents, especially where a gun is present. More than 65 percent of women who are killed by their intimate partners had previously been victims of domestic abuse. *See* Lawrence A. Greenfield et al., *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriend, and Girlfriends*, U.S. Department of

Justice Report No.: NCJ-167237 (1998). Many domestic violence incidents also occur in the context of heated arguments, in which an abuser may act impulsively and recklessly. In 2013, 280 women were shot and killed during the course of an argument. *See* Violence Policy Center, *When Men Murder Women: An Analysis of 2013 Homicide Data* (September 2015).

Guns are used by batterers to kill but also to intimidate and control. In one study, almost two thirds (64.5%) of women in emergency battered women's shelters in California who lived in a home with a gun reported that their partner had used a gun to scare, threaten, or harm her. Susan B. Sorenson & Douglas J. Wiebe, *Weapons in the Lives of Battered Women*, 92 AM. J. OF PUB. HEALTH 8, 1414 (August 2004). As the authors of this study concluded, "[f]irearms are more common in the households of battered women and their partners than among the general population, which is cause for concern, given the lethality of firearms. In addition, firearms can be used to intimidate a woman into doing something or allowing something to be done to her—such coercion would not necessarily result in physical injury or at least not in a gunshot wound." *Id.* at 1416.

Whether reckless or intentional, "[f]irearms and domestic strife are a potentially deadly combination nationwide." *Hayes*, 555 U.S. at 427.

III. The Relationship Between Intoxication and Domestic Violence Illustrates the Prevalence of "Reckless" Behavior in Domestic Violence as Addressed by Section 922(g)(9).

The prevalence of domestic abusers who act recklessly due to drug and alcohol abuse illuminates the dangerous implications of petitioners' argument that reckless conduct should be carved out of the reach of Section 922(g)(9).

In Maine, as in many states, defendants may present evidence of voluntary intoxication as a defense to specific intent crimes, but not for crimes with a *mens rea* of recklessness. *See* Me. Rev. Stat. tit. 17-A § 37.1-2 ("evidence of intoxication may raise a reasonable doubt as to the existence of a required culpable state of mind," except "when recklessness establishes an element of the offense"). As a result, domestic violence which would otherwise appear intentional may be charged or pled as reckless if the abuser was voluntarily intoxicated at the time of the abuse. By incorporating a *mens rea* of recklessness, the Maine generic battery statute (and similar state statutes) ensure that intoxicated domestic abusers are held liable for their conduct.

Intoxication and substance abuse is deeply embedded in many domestic violence incidents and relationships. Alcohol abuse is strongly associated with the perpetration and victimization of domestic violence, including nonfatal and fatal intimate partner violence. *See* Katherine A. Vittes et al., *Reconsidering the Adequacy of Current Conditions on Legal Firearm Ownership, in* REDUCING GUN

VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS at 68 (Daniel W. Webster and Jon S. Vernick, eds. 2013) (citing Phyllis Sharps et al., *The Role of Alcohol in Intimate Partner Femicide*, 10 AM. J. OF ADDICTIONS 2 (2001)). In one study, half of the men in court-referred batterer intervention programs who were surveyed reported that they had an alcohol-related diagnosis; a third of the same group reported symptoms consistent with a drug-related diagnosis. *See* Gregory Stuart et al., *Substance Abuse and Relationship Violence Among Men Court-Referred to Batterers' Intervention Programs*, 24 SUBSTANCE ABUSE 2 (June 2003). In another study, more than 45% of inmates in prison or jail who were convicted of a crime of violence against an intimate partner were drinking or using drugs at the time of the offense. *See* BUREAU OF JUSTICE STATISTICS FACTBOOK, *Violence by Intimates* (March 1998). Another found that around 60% of men in batterer intervention programs had substance use disorders—and that roughly the same proportion of men in substance use disorder treatment programs had committed acts of domestic violence against their partners. *See* Christine Timko et al., *Addressing Substance Abuse and Violence in Substance Use Disorder Treatment and Batterer Intervention Programs*, 37 SUBSTANCE ABUSE TREATMENT, PREVENTION, AND POLICY 7 (2012).

Those who work with domestic abusers agree that alcohol and drugs play an integral role in enabling many abusers. James J. Collins and Donna L. Spencer surveyed the staff of substance abuse treatment programs and domestic violence programs about the connection between substance abuse and

domestic violence. Nearly all of the staff surveyed—94.7% of those working in substance abuse programs and 98.6% of those working in domestic violence programs—responded that alcohol or drug use is used as an excuse by men who assault their partners. An overwhelming majority of the staff—98.5% of the substance abuse program staff and 75.9% of the domestic violence program staff—said that drinking or drug use increases the chances a man will assault his partner. *See* James J. Collins & Donna L. Spencer, *Linkage of Domestic Violence and Substance Abuse Services, Research in Brief, Executive Summary*, U.S. Department of Justice Document No.: 194122 (1999).

The combination of drugs, alcohol, and access to firearms is a particularly deadly combination. In general, individuals who drink in a chronic or acute way and who own guns present a greater risk to themselves and others than their sober counterparts. *See* Garen Wintemute, *Alcohol Misuse, Firearm Violence Perpetration, and Public Policy in the United States*, PREV. MED. (2015). In one study, respondents who owned firearms were more likely than those who did not live in a home with a firearm to engage in binge drinking, drive under the influence of alcohol, and have at least 60 drinks per month. *See* Katherine A. Vittes et al., *Reconsidering the Adequacy of Current Conditions on Legal Firearm Ownership, in* REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS at 69 (Daniel W. Webster and Jon S. Vernick, eds. 2013). Alcohol and controlled substance abuse are important predictors of future risk for violence, including using firearms on others

or oneself. *See* Garen Wintemute, *The Epidemiology of Firearm Violence in the Twenty-First Century United States*, ANNU. REV. PUBLIC HEALTH (2015). Substance use disorders correlate to threatening others with a firearm. *See* Hygiea Casiano et al. *Mental Disorder and Threats Made By Noninstitutionalized People with Weapons in the National Comorbidity Survey Replication*, J. NERV. MENT. DIS. (2008).

When a domestic abuser is acting under the influence of drugs or alcohol, adding a gun to the situation heightens the risk to all involved. In one survey of women in battered women's shelters, of the women who had been threatened by their partner with a gun, 74.5% reported their partner was intoxicated at the time. Susan B. Sorenson & Douglas J. Wiebe, *Weapons in the Lives of Battered Women*, 92 AM. J. OF PUB. HEALTH 8, 1414 (August 2004).

Under petitioners' proposed exclusion of reckless domestic violence, the Lautenberg Amendment would fail to restrict the access to guns of a broad category of intoxicated domestic abusers. Considering the increased risk of serious injury and fatality when drugs and alcohol are combined with firearms, it is implausible that Congress intended to leave a loophole open for domestic abusers with histories of substance abuse.

IV. The Practical Impact of Petitioners' Interpretation Would Exclude a Majority of State Assault and Battery Statutes and Allow Many Domestic Abusers Ready Access to Guns.

In enacting Section 922(g)(9), Congress recognized that "domestic abusers" were "routinely prosecuted under generally applicable assault or battery laws," rather than more serious offenses. *Hayes*, 555 U.S. at 427. *See also* 142 Cong. Rec. at 26,675 (statement of Sen. Lautenberg) ("[C]onvictions for domestic violence-related crimes often are for crimes, such as assault . . . ."). To close this "dangerous loophole," Congress intended a qualifying "misdemeanor crime of domestic violence" to include these generally applicable state (and federal) battery and assault laws. *Id.* at 22,986 (statement of Sen. Lautenberg).

Petitioners' interpretation, however, would exempt from Section 922(g)(9) misdemeanor assault or battery offenses from thirty-four states and the District of Columbia that define misdemeanor assault to include reckless conduct. *See* Resp. Br. 34 and App. B. *See also* LaFave § 16.2(c)(2), at 557 ("a substantial majority of the battery-type statutes" in modern criminal codes "expressly state that the crime may be committed by recklessness"); cf. Model Penal Code § 211.1(a)(1985) ("A person is guilty of assault if he . . . attempts to cause or purposefully, knowingly or recklessly causes bodily injury to another."). Petitioners' interpretation would also exclude federal assault crimes, which are interpreted to include recklessness. *See* Resp. Br. 40–41.

At the time of Section 922(g)(9)'s enactment, at least eight States had domestic violence assault provisions that proscribed reckless conduct expressly or by incorporating the State's general assault and battery provision. *Id.* at 39.[2] Nothing in the legislative history suggests that Congress intended to exclude these specific state domestic violence statutes from the scope of Section 922(g)(9).

To carve out such a broad swath of domestic violence offenses would render the Lautenberg Amendment inoperative in a substantial majority of states from the moment of its enactment. This Court has twice declined to render Section 922(g)(9) a "dead letter" by including limitations in the statute that would have made it "ineffectual" at the time of its enactment.

In *Hayes*, the Court rejected a requirement that the predicate misdemeanor identify a domestic relationship as an element of the crime because "construing § 922(g)(9) to exclude the domestic abuser convicted under a generic use-of-force statute . . . would frustrate Congress' manifest purpose, and would lead to the statute being "'a dead letter' in some two-thirds of the States from the very moment of its enactment." 555 U.S. at 426–27. *See also id.* at 427 ("[W]e find it highly improbable that Congress meant to extend § 922(g)(9)'s firearm possession ban only to the relatively few domestic abusers

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[2] Nine states have since added domestic assault and battery provisions that include recklessness. *Id.* at 39; App. C.

prosecuted under laws rendering a domestic relationship an element of the offense.").

In *Castleman*, the Court recognized that "if offensive touching did not constitute 'force' under § 921(a)(33)(A), then § 922(g)(9) would have been ineffectual in at least 10 States—home to nearly thirty percent of the Nation's population—at the time of its enactment." *Castleman*, 134 S. Ct. at 1413. The Court held that Congress would not have intended the statute to be interpreted in a manner that would have "would have rendered § 922(g)(9) inoperative in many States at the time of its enactment." *Id.*

Petitioners' interpretation here would exempt a far greater number of state misdemeanors than the proposed interpretation rejected by this Court in *Castleman*, making it all the more implausible that Congress intended such an absurd result.

Under the categorical approach, the effect of petitioners' interpretation will not only result in exempting incidents of reckless domestic violence, but will also exempt intentional acts of domestic violence where a defendant pleads to the generic offense. The point is well illustrated by the underlying cases of petitioners Voisine and Armstrong.

In June 2003, and again in 2005, Voisine was convicted of misdemeanor assault. *Voisine*, 778 F.3d at 178. His 2003 conviction arose after he slapped his girlfriend, who reported that he was intoxicated at the time. *See* Br. in Opp. at 5 (citing Voisine C.A. App. 33). According to the police report, his

girlfriend told the officer that Voisine was drunk, that he "had slapped her in the face," and that "this was not the first time it happen[ed]." *Id.* Voisine pleaded guilty of simple assault. *Id.* Voisine was arrested in 2009, for shooting a bald eagle with a rifle. *Voisine*, 778 F.3d at 178.

In 2002 and 2008, Armstrong was convicted of misdemeanor assault. *Voisine*, 778 F.3d at 178. In 2008, Armstrong was convicted of misdemeanor assault after an argument escalated between him and wife in which he pushed and then hit his wife "hard." *See United States v. Armstrong*, 706 F.3d 1, 2–3 (1st Cir. 2013), *cert. granted, judgment vacated*, 134 S. Ct. 1759, 188 L. Ed. 2d 590 (2014). In 2010, police searched his house for drug paraphernalia and marijuana and found six guns and ammunition at his house. *Id.*

In both Voisine and Armstrong's cases, the underlying facts involved a knowing or intentional "use of force" against the victim: slapping and shoving.[3] Under the categorical approach, however, courts look to the generic offense, especially where, as here, a defendant's guilty plea tracks the language of the generic assault statute and no facts are admitted into the record. If petitioners' interpretation of Section 922(g)(9) is adopted, all persons convicted under the generic version of the

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[3] To the extent Voisine's intoxication at the time of the assault would render his conduct merely "reckless," that would further support not adopting petitioners' interpretation. *See* Section III, *supra*.

statute—even if the underlying conduct was in fact intentional or knowing—will not be covered by the statute and be able to legally possess firearms.

Congress enacted the Lautenberg Amendment to resolve the problem that domestic violence offenders were not covered by the existing gun control laws because of the realities of charging and pleading practices. To adopt petitioners' proposed limitation would re-open the very loophole Congress intended to close.

Congress intended Section 922(g)(9) to reach broadly to all domestic violence, "no matter how it is labeled"; no "ifs, ands, or buts." *See* 142 Cong. Rec. at 19,415, 22,986 (statements of Senator Lautenberg); *see also* 142 Cong. Rec. at 27,264 (the law "would prevent anyone convicted of *any kind* of domestic violence from owning a gun") (statement of Sen. Dodd) (emphasis added).

Petitioners' attempt to read a heightened *mens rea* requirement into Section 922(g)(9) has no basis in the statutory text and conflicts with the clear legislative intent to include *all* domestic violence offenses. Petitioners' interpretation would also frustrate the manifest purpose of the Lautenberg Amendment by allowing a substantial number of domestic abusers whose reckless behavior poses a significant threat to their partners and families to have ready access to firearms.

CONCLUSION

For the foregoing reasons, the judgment of the First Circuit should be affirmed.

Respectfully submitted,

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